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No. 843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DR. F. ALLEN RUTHERFORD, ET AL.,

Petitioners,

vs.

THE AMERICAN MEDICAL ASSOCIATION, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY FOR THE PETITIONERS TO THE MEMORANDUMS OF THE AMERICAN MEDICAL ASSOCIATION, OLIVER FIELD, DR. ALBERT SEGALOFF, DR. AUSTIN SMITH, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, DR. WARREN G. COLE, DR. GEORGE STODDARD, THE ATTORNEY GENERAL AND SOLICITOR GENERAL OF THE UNITED STATES AND OTHERS.

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On January 3, 1966, petitioners filed a complaint for injunctive relief in the United States District Court for the Northern District of Illinois under the provisions of

the Sherman Antitrust Act (15 U.S.C. 26) and the Civil Rights Statutes (42 U.S.C. 1983-1985). The suit is private in nature and no agency of the United States Government was made a party to the suit.

ANSWERING RESPONDENTS, THE AMERICAN MEDICAL ASSOCIATION, FIELD, SEGALOFF, and SMITH, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, COLE and STODDARD.

In so far as these respondents are concerned, this Court must disregard completely the red herring defense of relying on any provisions of the Federal Food, Drug, and Cosmetic Act, or the enforcement thereof. No such defense is available to allegations of violations of the Sherman Act or the Civil Rights Act. This was made clear in *United States* v. *American Medical Association,* 110 F. 2d 703, cert. den. 310 U.S. 644. There, justification was sought for the commission of the crime that its commission benefited the community. "Neither the fact that the conspiracy is intended to promote the public welfare, or accomplish some ultimate good", or "even if it was for the purpose of enforcing the law . . . is sufficient to avoid the penalties of the Sherman Act." The instant case must receive the same treatment as this same respondent received in that case. *United States* v. *American Medical Association, supra.* We respectfully refer this Court to our citations from that case on pp. 27-29, in Petition for Certiorari. This Court must also consider the fact that this is an admitted continuous conspiracy which commenced in 1950, and still continues. From 1950 until June 1963 this red herring defense was not available to these respondents, and during this period we had the fraudulent and forged report of the American Medical Association

published in its Journal on September 27, 1951, and the fraudulent article by Szujewski in the same journal on March 27, 1952. All acts of each and every one of these respondents in this phase of the conspiracy are outlined with particularity from pages 39 to 66 in the Amended Complaint — perhaps with a little too much particularity — but Rule 9(b) of the Federal Rules of Civil Procedure does require this "particularity" and so do the decisions of this Court and the Court of Appeals. Webster, Winston, Brittanica, and Oxford dictionaries unanimously define the word "particularity" as "strict attention to detail; minute exactness; fastidiousness; peculiarity, and characteristic quality." *Sterns* v. *Page,* 48 U.S. 319; *Swift and Company* v. *United States,* 196 U.S. 375; *Chamberlain Machine Works* v. *United States,* 270 U.S. 349; *Ware-Kramer Tobacco Company* v. *American Tobacco Company,* 178 Fed. 117.

There can be little doubt but the participation of the respondents Cole, Pierce, and Slaughter, who acted under "color" of law from the State University of Illinois in this phase of the illegal scheme alleged, brings the conspiracy within the prohibitions of the Fourteenth Amendment and sections 1983-1985, Title 42, U.S.C. The decisions of this Court are unanimous on this question. *United States* v. *Price,* 383 U.S. 787; *United States* v. *Mosely,* 238 U.S. 383; *United States* v. *Guest,* 383 U.S. 745. Moreover, the American Medical Association *per se,* even in the absence of participation of Cole, Pierce, and Slaughter from the University of Illinois, is subject to the prohibitions of the Fourteenth Amendment. *Munn* v. *Illinois,* 94 U.S. 113; *Holden* v. *Hardy,* 169 U.S. 366; *Marsh* v. *Alabama,* 326 U.S. 51; *Evans* v. *Newton,* 382 U.S. 296; *Terry* v. *Adams,* 345 U.S. 461; *Hawkins* v. *North Carolina Dental Society,* 355 F. 2d 718.

As to the respondents, the Board of Trustees of the University of Illinois, Cole and Stoddard, the facts which constitute the fraud and conspiracy involved in the "Conclusions" and "Recommendations" by Cole and Stoddard are also stated with particularity from page 66 to page 97 in the Amended Complaint. These fraudulent "Conclusions" and "Recommendations" were released to the world on September 20, 1952. (P. 79, Amended Complaint). The question here involved is whether these "Conclusions" and "Recommendations" were fraudulent as alleged, and was their release in the furtherance of the conspiracy in violation of the Antitrust statutes. This is a matter of fact which can be resolved only on a hearing, and on competent legal evidence. It has nothing to do with any amendment of section 355(i), Title 21, U.S.C. effective eleven years later, nor were the acts of the respondent immunized retroactively by this amendment. Again we refer to the citation of the *United States* v. *American Medical Association,* 110 F. 2d 703, on the bottom of page 28, in the Petition for Certiorari: These petitioners have as much right "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the Antitrust Laws" under section 26, Title 15, U.S.C.A. as the Attorney General had to prosecute the American Medical Association in that case under similar statutes of Title 15, as long as the threatened loss or damage is the proximate result of the violations. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company,* 334 U.S. 219, 236. Perhaps on a hearing in the District Court these respondents can show these charges unwarranted, or the petitioners cannot prove them, but for present purposes the charges must be taken as though their verity were established. In that light it is clear that the offenses alleged come within the condemnation of the Antitrust

and Civil Rights Statutes, *United States* v. *American Medical Association,* 110 F. 2d 703. The allegations of fact in the Amended Complaint are true or they are false, or they are partly true or partly false. To ascertain their verity requires a hearing in the District Court. To accomplish this, the most reasonable and expeditious procedure is to grant the Petition for Certiorari; vacate the judgment of the Court of Appeals; and remand the cause to the District Court for a hearing on these facts. If the Court sees fit it can suggest or order the Complaint amended. We have no brief from the respondent, The American Cancer Society, and have no comment thereon, having nothing to answer. For present purposes the report of the American Cancer Society in 1959 must be taken as a fraud as alleged in the Complaint. This brings us to the brief of the Solicitor General in behalf of some persons who were employed by the government, and some who were not.

REPLY TO SOLICITOR GENERAL and ATTORNEY GENERAL

This memorandum correctly recognizes that petitioners allege that the "respondents combined and conspired to discredit the medical efficacy of the alleged anticancer drug, Krebiozen, and to impede the interstate distribution of that drug to those who wished access to it." This is the very gist of this lawsuit, and the questions are why does the American Medical Association combine and conspire to impede such interstate distribution, and what are the methods employed? The first question is answered by the fact that this Association is a trade monopoly and to ascertain this fact these gentlemen need only refer to their own indictment procured against this Association in Washington, D. C. a few years ago in *United States* v.

American Medical Association, 110 F. 2d 703, and where the indictment was made the subject of the identical descriptive adjectives as the Amended Complaint in the instant case, and the second question is answered by the reasonable conclusion that to maintain and preserve an existing criminal fact required criminal activity. This is no different than a criminal fact in gambling, prostitution or other criminal activity. It was extremely unfortunate that employees of the government allowed themselves to become involved through their superiors in this combination. But then again, it is impossible to maintain and preserve a criminal combination without some aid from those who are supposed to enforce the law. It would probably have been better judgment of the petitioners in the first instance to have named the government employees as mere conspirators instead of defendants. This is the first suit of its kind where the office of the Solicitor General and Attorney General have joined forces with a criminal combination in violation of the antitrust laws of Civil Rights Act. This juncture enables the American Medical Association to set up a fictitious defense as a law enforcement agency in validation of its criminal combination, and, therefore, "justify concerted criminal action to prevent the people from developing new methods of serving their needs." *American Medical Association* v. *United States,* 317 U.S. 519. Contrary to that decision this monopoly to enforce a law has a "license to commit crime."

The memorandum next states that:

> "The District Court, without considering the merits of the allegations regarding a conspiracy, found that the sponsors of Krebiozen had never made a bona fide attempt to have the drug licensed for interstate distribution under the provisions of the Federal Food,

> Drug, and Cosmetic Act and that it was this failure on the part of the sponsors to comply with the licensing procedure, rather than the alleged misconduct of respondents, which prevented and would continue to prevent the interstate distribution of Krebiozen."

This statement is totally inconsistent with the facts which are all around conceded by the respondents themselves, and the Court may only refer to pages 31-33 in the Petition for Certiorari: On three different occasions applications were made under section 355(a) and (b), Title 21, U.S.C., and all three were denied, not on the merits, but on the grounds that Krebiozen, because of its evident components, did not come within the provisions of the Federal Food, Drug, and Cosmetic Act, but instead, it came under the provisions of the Public Health Service Act, and that "Nothing is to be gained by considering the product as a new drug under the Food, Drug, and Cosmetic Act." It is the Solicitor General and the respondents who reject the scientific determinations of the Department of Health, Education and Welfare. Petitioners seek to enforce the determinations of this scientific expertise, not to challenge them. Coming, as it does, under the Public Health Service Act, Krebiozen when distributed interstate for "sale, barter or exchange" is subject to the penal provisions of section 262, Title 42, U.S.C. But absent the elements of "sale, barter or exchange" there is no restriction on interstate distribution for "use in scientific and experimental research." This has been the construction of this penal statute for half a century, 29 Opinion of Attorney General 340, and remains unquestioned to this day, nor has the Attorney General revised this Opinion. Moreover, he must give to this penal statute a strict construction. The District Court fully realized what relief the petitioners sought when it said that:

> "The prayer for relief seeks an order enjoining the defendants 'from impeding, hindering, or impairing the free *uncommercial* flow of Krebiozen interstate . . . to the physicians of the plaintiffs . . . for the purpose of continuing experimentation on the plaintiffs by their doctors'."

This brings up a question of construction of a law of the United States where the petitioners could be sustained on one construction and defeated on the point by an opposite construction, and therefore it is jurisdictional. *Bell* v. *Hood*, 327 U.S. 678; *The Fair* v. *Kohler Die and Specialty Company*, 228 U.S. 22. However, sustaining the petitioners would not be sufficient if the conspiracy is left unjoined. The conclusive proof of this can be inferred from the fact that for thirteen years prior to any challenge to interstate distribution of Krebiozen for "use in scientific and experimental research" the conspiracy existed. A construction of section 355(i), Title 21, U.S.C. is also involved. This new amendment, effective in June 1963, relates only to drugs covered by the sub-sections foregoing sub-section (i) to "enable him (the Secretary) to evaluate the safety and effectiveness of such drug *in the event of the filing of an application pursuant to* sub-section (b)." Section 355(i)(3), Title 21, U.S.C. Since the scientific expertise of the Department of Health, Education, and Welfare has determined that, where Krebiozen is concerned, there can be no valid effective application pursuant to section 355(b), Title 21, U.S.C., the amendment to sub-section (i) can have no application, and any regulations promulgated by the Secretary extended beyond the express words of the statute would not be regulation but legislation, and unconstitutional. This question like the question before it is jurisdictional as petitioners could be sustained by one construction and defeated on the point by an opposite

construction. That these two questions are jurisdictional was admitted by the Court of Appeals in *Rutherford et al.* v. *American Medical Association,* 379 F. 2d 641, 644 as follows:

> "The first four questions asked are jurisdictional in nature and involve the construction of various federal statutes considered here in, *inter alia,* the Federal Food, Drug and Cosmetic Act, the Public Health Service Act, the Sherman Antitrust Act, and the Federal Civil Rights Act. The fifth and sixth questions concern a determination of whether the American Medical Association and the American Cancer Society are subject to the restrictions and prohibitions contained in the fourteenth Amendment and the Civil Rights Act.
>
> " . . . In view of our disposition of this appeal, plaintiffs are left with the right to seek review thereof by petition to the Supreme Court for a Writ of Certiorari."

This Memorandum correctly recognizes that the Petitioners allege that the "Respondents combined and conspired to discredit the medical efficacy of the alleged anticancer drug, Krebiozen, and to impede the interstate distribution of that drug to those who wished access to it."

However, it then, in error of fact, misstates that "Petitioners alleged that the American Cancer Society (allegedly a part owner of the anticancer drug, 5-FU) secured a monopoly in the distribution of anticancer drugs and that the impediment to the interstate distribution deprived petitioners of their civil rights." This is "confusion worse-compounded," perhaps resulting from lack of sufficient acquaintance with the pleadings.

What the Petitioners allege is not that the Petitioners were deprived of their civil rights because of any monopoly of the American Cancer Society in the distribution of

anticancer drugs. The Petitioners would have supposed that it is common knowledge that the American Cancer Society has no charter authority to distribute any drugs and, of course, the Petitioners could hardly have alleged that it has any monopoly in such distribution.

What the Petitioners do allege, as they have striven in every way to communicate in their pleadings, is that it is the American Medical Association which has a monopoly, not in the distribution of anticancer drugs, but in the "trade of medicine". *American Medical Association v. United States,* 130 F. 2d 233, affirmed 317 U.S. 519. If there is any question in the mind of the Solicitor General as to whether such a monopoly does in fact exist *he need only refer to the indictment which he himself filed in that case.* (Record of that case, Vol. 1, pp. 7-20).

The writ of certiorari should be granted, the judgment of the United States Court of Appeals vacated, and the cause remanded to the District Court for a hearing on the facts alleged in the complaint, or in the alternative, the writ of certiorari should be granted and the case heard on the merits by this Court.

Respectfully submitted,

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Attorney for Petitioners

January, 1968.